Present: Pereira J. and Ennis J. 1913.

WIRASINGHE *et al. v.* RUBEYAT UMMA *et al.*

222—D. C. Matara, 5,654.

Fidei commissum residui—*Usufruct—Joint will—Expert.*

The joint will of A and his wife B, who were married in community of property, contained the following clauses :—

" (2) It is directed that all the movable and immovable property belonging to us be possessed by us, the above-named, during the lifetime of both of us according to our wish ; if one should die and the other survive, the person who lives is directed as far as in us lies to possess the property according to his or her pleasure, and also to do whatever he or she likes with it.

" (3) It is directed that after the death of both of us all the movable and immovable property belonging to us shall devolve on the children, grandchildren, and such other heirs descending from us."

Held, that the will created a *fidei commissum residui*, and that the survivor was a fiduciary with free power of alienation.

PEREIRA J.—In the case of a *fidei commissum residui*, the fiduciary should, generally speaking, allow at least a fourth share of the inheritance to go down to the *fidei commissaries*, but this is not usually insisted on in the case of such a *fidei commissum* constituted by the joint will of spouses whereby one is made heir to the other.

PEREIRA J.—As a rule, the opinions of experts are not receivable upon questions of construction of documents, but it is otherwise in the case of local, provincial, foreign, or technical terms and expressions. It is the province of the expert to say what is commonly intended by the use of a given expression.

THE facts appear from the judgment.

H. J. C. Pereira (with him *Batuwantudawe*), for the defendants, appellants.—It is clear from the translation and evidence of Mudaliyar Gunasekera that the will in question creates a *fidei commissum*.

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The decision in *Weerasinghe v. Gunatilleke* [1] was based on a wrong translation. Expert evidence was admissible to find out the meaning of the will, and the District Judge was wrong in ignoring the evidence of the expert. The will gives the survivor power to deal with the property.

Counsel cited *Rabot v. Neina Marikar;* [2] *Nathan's Common Law of South Africa, vol. III., sec. 1898.*

H. A. Jayewardene (with him *A. St. V. Jayewardene*), for the plaintiffs, respondents.—The will was interpreted in *Weerasinghe v. Gunatilleke* [1] by a bench of two Judges, and it was held that the survivor had only a usufruct. It is a binding authority. It is not competent to this Court to over-rule that decision.

The surviving spouse did not obtain probate at the time he transferred the land. He had only a right to transfer his share; he could not have transferred his wife's share without obtaining probate.

Counsel cited *Buultjens v. Wickremeratne,* [3] *Mohideen Hadijar v. Pitchey,* [4] *Charles Hamy v. Jane Nona.* [5]

H. J. C. Pereira, in reply.—The heirs can dispose of a property before grant of probate (*Silva v. Silva* [6]). Counsel also referred to *Ferdinandus v. Fernando.* [7]

Cur. adv. vult.

August 5, 1913. PEREIRA J.—

The substantive question for decision in this case is as to the extent of the interest in the common property of the testator and testatrix left to the survivor by the last will and testament of David Ekanaike and his wife Nancy Felicia. But for the decision in the case of *Weerasinghe v. Gunatilleke,* [1] I should find no difficulty whatever in answering this question. In the case cited the same question was before this Court, and it was held that the interest in the common property left to the survivor by the joint will was only a usufruct. That decision, of course, turned entirely upon the translations of the will that were then before the Court. Where such a decision is given with reference to words or expressions in an English document, I should have no hesitation in following it as an authority, but here what the true meaning to be assigned to the Sinhalese words used in the will was a preliminary question of fact, and that circumstance divests the decision of the force of a binding authority in law. The translation that was before the Court of the material words was as follows: " In the event of one of us predeceasing the other, the above-named property (meaning the movable and immovable property of the common estate) shall be possessed according to the wish, and dealt with according to the

[1] *(1910) 14 N. L. R. 88.*
[2] *(1913) 16 N. L. R. 99.*
[3] *(1910) 5 S. C. D. 13.*
[4] *(1894) 3 S. C. R. 105.*
[5] *(1912) 15 N. L. R. 481.*
[6] *(1907) 10 N. L. R. 245.*
[7] *(1903) 6 N. L. R. 328.*

pleasure, of the survivor." I do not think that the true sense of the expressions used in the will is conveyed by these words. I am quite in agreement with Mudaliyar Gunasekara, a Sinhalese scholar of repute, when he says that the correct translation is: "If one should die and the other survive, the person who lives is directed as far as in us lies to possess the property according to his or her pleasure, and to do whatever he or she likes with it." I would go a little further, and say that the force of the conjunction "*saha*" is "and also" rather than "and." I also agree with this witness in thinking that the words quoted constitute a "regular Sinhalese phrase or sentence used to convey the fullest and most absolute rights over property." The District Judge takes exception to this expression of opinion by the witness. He thinks that when the witness had given the bare meaning of the words used, it was for the Court to say what was intended or meant. I am not prepared to agree with the District Judge here. There are numerous phrases and other expressions in the Sinhalese language, as, indeed, there are in other languages, which are tantamount to stock phrases and expressions to convey certain ideas. A mere translation of some of these may amount to a senseless concatenation of words. It is the province of the expert to say what is commonly intended by the use of a given expression. As a rule, the opinions of experts are not receivable upon questions of construction of documents, but it is otherwise in the case of local, provincial, foreign, or technical terms and expressions, and I think that it is quite permissible in the present case to take into consideration Mudaliyar Gunasekara's opinion as to the sense in which the particular expression referred to by him is used by the Sinhalese. The words used in the will in the present case go further, in the direction of conferring absolute ownership, than those (held by this Court to have that effect) in the will considered in the case of *Ferdinandus v. Fernando*,[1] although it must be noted that the words used in that will to describe the interest of the *fidei commissarii* possibly influenced the Court in interpreting the words used to describe the interest of the instituted heir. Clearly, the intention of the testator and testatrix in the present case was to create what is well known to the Roman-Dutch law as a *fidei commissum residui*, that is to say, a *fidei commissum* with full power to the fiduciary of free alienation. Van Leeuwen says (*Cens. For. 1, 3, 7, 15*): "Just as power of alienation is forbidden with a view to the creation of a *fidei commissum*, so, too, in some cases, in the *fidei commissum* itself, free power of alienation is granted, as for instance, if any one be instituted heir on condition of giving up as much as remains after his death of the inheritance in question, as is frequently done in the case of a husband and wife, who usually not only leave reciprocally to one another the usufruct of all their property, but also give each other complete power of alienating and

[1] *(1903) 6 N. L. R. 328.*

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making away with it at any time." Voet speaks very much to the same effect in *36, 1, 54* and *56*. It was argued that in the present case the survivor was not appointed " heir," and reference was made to the note at page 122 of the McGregor's translation of Titles 1 and 2 of Book 36 of Voet's Commentaries; but the present case is not similar to the case there referred to, and if it were necessary that the survivor should be appointed heir, it is clear that in the present case the survivor was in effect appointed heir. In the case of *Weerasinghe v. Gunatilleke* [1] cited already, it was held, as observed above, that the survivor took only a usufruct in the property devised by the will. The question of a probable intention to create a *fidei commissum residui* does not appear to have been considered in that case. The respondents' counsel is stated to have said that it did not matter whether the survivor was a *fiduciarius* or *usufructuarius*, but it is manifest that there is a great difference between the rights of a fiduciary in the case of a *fidei commissum residui* and a mere usufructuary. In my view the fact that not only immovable property but movable property is dealt with by the provision in question of the will renders it highly improbable that the intention was that the survivor should have no more than a mere usufruct in the property devised. It has been argued that the fact that by the third clause of the will it is provided that all the property should after the death of both the testator and the testatrix devolve on their children is an indication that it was intended that the survivor should have only a usufruct, but this clause has to be read subject to the second, and as meaning no more than that it indicates the *fidei commissarii* on the *fidei commissum* created as shown above. In the case of a *fidei commissum residui* the fiduciary should, generally speaking, allow at least a fourth share of the inheritance to go down to the *fidei commissaries*, but this is not usually insisted on in the case of such a *fidei commissum* constituted by the joint will of spouses whereby one is made heir to the other (see *Voet 36, 1, 56*). Anyway, in the present case, the question as to whether the surviving testator has allowed any share of the property in claim to go down to the substituted heirs does not appear to have been raised, and, moreover, the requirement would apply, if at all, to a fourth share of the whole inheritance and not of any particular property, and it is a question whether this requirement is not impliedly abrogated by section 1 of Ordinance No. 21 of 1844. The District Judge's ruling that the appellants would not be entitled to compensation for improvements in the event of their being obliged to give up a half share of the land in claim is clearly erroneous.

For the reasons given above I would set aside the judgment appealed from, and dismiss the plaintiffs' claim with costs.

ENNIS J.—I agree.

Set aside.

[1] *(1910) 14 N. L. R. 88.*